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Appellants:	Richard N. Dodge II et al.	Docket No.:	14,596
Serial No.:	10/662,073	Group:	3761
Confirmation No.:	9799	Examiner:	Karin M. Reichle
Filed:	September 12, 2003	Date:	July 28, 2008
For:	Absorbent Composites Comprising Superabsorbent Material With Controlled Rate Behavior		

Appeal Brief Transmittal Letter

Mail Stop Appeal Brief - Patents
Commissioner For Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Sir:

Pursuant to 37 C.F.R. 41.37, transmitted herewith is an Appeal Brief pursuant to the Notice of Appeal which was mailed on May 27, 2008.

Please charge the \$510.00 fee (fee code 1402), pursuant to 37 C.F.R. 41.20(b)(2), which is due to Kimberly-Clark Worldwide, Inc. deposit account number 11-0875.

Respectfully submitted,

RICHARD N. DODGE II ET AL.

By: 

Bryan R. Rosiejka

Registration No.: 55,583

CERTIFICATE OF TRANSMISSION

I, Bryan R. Rosiejka, hereby certify that on July 28, 2008 this document is being facsimile transmitted to the United States Patent and Trademark Office, Fax No. (571) 273-8300.


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Brief on Appeal to the Board of Patent Appeals and Interferences

Mail Stop Appeal Brief - Patents
Commissioner For Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Sir:

Pursuant to 37 C.F.R. 41.37 Appellants respectfully submit this Brief in support of their Appeal of Examiner Reichle's **Rejection** of claims 1 – 18, 12 – 20, and 22 - 26 which was mailed on February 27, 2008.

On May 27, 2008, Appellants, pursuant to 37 C.F.R. 41.31 mailed a timely Notice of Appeal. The time period for filing this Brief ends on July 27, 2008. However, because July 27 2008, falls on a Sunday, this Brief is timely filed on Monday, July 28, 2008.

Real Party in Interest

The present Application has been assigned to Kimberly-Clark Worldwide, Inc.

Related Appeals and Interferences

There are no related appeals and/or interferences with regard to the present Application.

Status of Claims

Claims 1 – 9, 12 – 20, and 22 - 26 remain in the application with claims 1 – 9, 12 – 20, and 22 – 26 being rejected. Claims 10, 11, and 21 were previously canceled. The appealed claims include 1 – 9, 12 – 20, and 22 – 26 and appear in the CLAIMS APPENDIX of this Brief.

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Status of Amendments

An amendment was filed along with the Notice of Appeal with regard to the present Application on May 27, 2008.

Summary of Claimed Subject Matter

The following concise explanation of the subject matter defined in each of the independent claims involved in the appeal refers to the page and line numbers of the Specification filed on September 12, 2003. While the following summary correlates claim elements to specific embodiments described in the application specification, it does not in any manner limit claim interpretation. Rather, the following summary is provided only to facilitate the Board's understanding of the subject matter of this appeal.

Generally, the present invention is directed to absorbent composites comprising superabsorbent materials with controlled rate behaviors.

Independent claim 1 is directed to an absorbent composite comprising superabsorbent material (Specification page 3 lines 4-5). The superabsorbent material has an Absorption Time of about $5+10 a^2$ minutes or greater, where "a" is the mean particle size of the superabsorbent material in millimeters (Specification at page 6 lines 2-4 and page 22 lines 9-10). The superabsorbent material also has an equilibrium absorption capacity of about 15 g/g or greater as measured by the FAUZL test (Specification at page 3 lines 9-10, page 6 lines 2-5 and Table 1). In addition, the superabsorbent material has been neutralized from 30 mole % to 65 mole % with a monovalent metal hydroxide, and further from 5 mole % to 40 mole % with a divalent metal hydroxide (Specification Examples 1-8, more specifically page 11 lines 19-20, page 12 lines 5-6, page 12 lines 28-29, page 13 lines 14-15, page 14 lines 4-5, page 14 lines 29-30, page 15 lines 15-16 and page 16 lines 4-5).

Independent claim 12 is directed to a disposable product comprising an absorbent composite (Specification page 3 lines 21-23). The absorbent composite comprises a superabsorbent material having an Absorption Time of about $5+10 a^2$ minutes or greater, where "a" is the mean particle size of the superabsorbent material in millimeters (Specification at page 6 lines 2-4 and page 22 lines 9-10). The superabsorbent material also has an equilibrium absorption capacity of about 15 g/g or greater as measured by the FAUZL test (Specification at page 3 lines 9-10, page 6 lines 2-5 and Table 1). In addition, the superabsorbent material has been neutralized from 30 mole % to 65 mole % with a monovalent metal hydroxide, and further from 5 mole % to 40 mole % with a divalent metal hydroxide (Specification Examples 1-8, more specifically page 11 lines 19-20, page 12 lines 5-6, page 12 lines 28-29, page 13 lines 14-15, page 14 lines 4-5, page 14 lines 29-30, page 15 lines 15-16 and page 16

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lines 4-5).

Independent claim 23 is directed to an absorbent disposable garment comprising a body-side liner, an outer cover superposed in facing relation with the body-side liner, and an absorbent composite located between the body-side liner and the outer cover (Specification page 10 lines 21-25). The absorbent composite comprises a superabsorbent material having an Absorption Time of about $5+10a^2$ minutes or greater, where "a" is the mean particle size of the superabsorbent material in millimeters (Specification at page 6 lines 2-4 and page 22 lines 9-10). The superabsorbent material also has an equilibrium absorption capacity of about 15 g/g or greater as measured by the FAUZL test (Specification at page 3 lines 9-10, page 6 lines 2-5 and Table 1). In addition, the superabsorbent material has been neutralized from 30 mole % to 65 mole % with a monovalent metal hydroxide, and further from 5 mole % to 40 mole % with a divalent metal hydroxide (Specification Examples 1-8, more specifically page 11 lines 19-20, page 12 lines 5-6, page 12 lines 28-29, page 13 lines 14-15, page 14 lines 4-5, page 14 lines 29-30, page 15 lines 15-16 and page 16 lines 4-5).

Grounds of Rejection to be Reviewed on Appeal

Ground 1

Specification terms do not fail to comply with 35 U.S.C. §112, first paragraph.

Ground 2

Claims 1 – 9, 12 – 20, and 22 – 26 were rejected under 35 U.S.C. §112, first paragraph, as failing to comply with the written description requirement.

Ground 3

Claims 1 – 9, 12 – 20, and 22 – 26 were rejected under 35 U.S.C. §112, first paragraph, as failing to comply with the enablement requirement.

Ground 4

Claims 1 – 9, 12 – 20, and 22 – 26 were rejected under 35 U.S.C. §112, first paragraph, as failing to comply with the written description requirement.

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Ground 5

Claims 1 – 9, 12 – 20, and 22 – 26 were rejected under 35 U.S.C. §112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicants regard as the invention.

Ground 6

Claims 1 – 9, 12 – 20, 22 – 26 were rejected under 35 U.S.C. §102(b), as anticipated by or, in the alternative, under 35 U.S.C. §103(a) as obvious over World Publication No. WO 01/41818 issued to The Dow Chemical Company (hereinafter "Dow").

Argument

1. Specification terms do not fail to comply with 35 U.S.C. §112, first paragraph.

In paragraph 3 of the Office Action mailed February 27, 2008, the Examiner states that 35 U.S.C. §112, first paragraph, requires the specification to be written in "full, clear, concise, and exact terms." The Examiner states the specification is replete with terms which are not clear, concise, and exact. The Examiner also states the specification should be revised carefully in order to comply with 35 U.S.C. §112, first paragraph. Further, the Examiner states that examples of some unclear, inexact or verbose terms used in the specification are: page 6, line 33.

a. Clarity of terms.

Appellants respectfully submit that the specification meets the requirements of 35 U.S.C. §112, first paragraph. The Examiner has specified page 6 line 33 as a potential concern, but has not articulated the concern with any particularity. Page 6 line 33 states "...a Gel Bed Permeability about $50 \times 10^{-9} \text{ cm}^2$ or greater and even more suitably, Class I superabsorbent material may have a Gel Bed Permeability of about $80 \times 10^{-9} \text{ cm}^2$ or greater ..." This certainly meets the requirements of 35 U.S.C. §112, first paragraph and includes full, clear, concise, and exact terms. Furthermore, the Examiner has not specifically pointed to any other places in the Specification that allegedly do not meet the requirements of 35 U.S.C. §112, first paragraph.

Accordingly, the Examiner's position that the specification should be revised should be reversed.

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2. Claims 1 – 9, 12 – 20, and 22 - 26 do not fail to comply with the written description requirement of 35 U.S.C. §112, first paragraph.

In paragraph 5 of the Office Action mailed February 27, 2008, the Examiner states claims 1-9, 12-20 and 22-26 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The Examiner states the claim(s) contain subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention. The Examiner also states the claims now require a superabsorbent material which has an Absorption Time of about 5+10 a2 minutes or greater, wherein a is the mean particle size of the superabsorbent material in millimeters, and an equilibrium absorption capacity of about 15 g/g or greater as measured by the FAUZEL test and which has been neutralized from 30 mole % to 65 mole % with a monovalent metal hydroxide, and further from 5 mole % to 40 mole % with a divalent metal hydroxide. Further, the Examiner states that Appellant cites a plurality of places for support for such added claim language in the first full paragraph of page 15 of the 1-15-08 response. The Examiner states, however, that while such places provided support for specific wt % of acrylic acid being first neutralized with sodium hydroxide to one specific mole percentage, e.g. 60% at page 11, lines 19-20, 50% at page 12, line 6, 30% at page 12, line 29, 40% at page 13, line 5, 30% at page 14, line 5, 55% at page 14, line 30, 50% at page 15, line 16 and 65% at page 16, line 5 and then neutralized with a divalent metal hydroxide, i.e. a further 10% with calcium hydroxide, a further 20% with calcium hydroxide, a further 40% with calcium hydroxide, a further 30% with magnesium hydroxide, a further 40% with calcium hydroxide, a further 15% with calcium hydroxide, a further 20% with magnesium hydroxide and a further 55% with calcium hydroxide, respectively, and then still further specifically processed, e.g. other additional materials, coatings, etc., this is not what is claimed. Additionally, the Examiner states the support, i.e., the Examples, relied upon by Appellant result in materials or composites which have a combination of properties, see, e.g., Table 1 on page 17, which are not the combinations claimed. For example, the Examiner instructs Appellants to see the Measured Absorption Time of Examples 7 and 8 relied upon and that claimed in claims 3 and 14 and the Gel Bed Permeability of Examples 3 and 4 and that claimed in claims 4 and 15 and that the property of ½ Float Saturation is no longer claimed at all. The Examiner states if Appellants maintain such claim language, the portion of the original application which provides support for the scope of the entire combination of each claim in a single embodiment should be set forth, e.g., each possible combination of mole percents of the monovalent and divalent hydroxides set forth in the respective ranges in combination with a claimed Time and capacity, e.g., where the support for a superabsorbent which includes a Time and capacity as claimed which has been neutralized 30 mole percent with a monovalent hydroxide and further from 5 mole percent with a divalent hydroxide. The same as the former but further from 6 mole percent, from 7 mole percent, etc.

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The same as the first by neutralized 31 mole percent with the monovalent hydroxide.

a. Examples and ranges meet the requirements of 35 U.S.C. §112, first paragraph.

With respect to the Examples, the Examiner states that the examples "result in materials or composites which have a combination of properties...which are not the combinations claimed." In response, Appellants respectfully note that a claim need only contain those elements, steps, and/or relationships which constitute that portion of the claimed combination which the Appellant considers as the new or improved portion (e.g., 37 C.F.R. 1.75(e)(3)). Neither 35 U.S.C. 112, first paragraph, nor the MPEP, requires Appellants to claim all properties that happen to be measured and exhibited in the examples. In contrast, the MPEP indicates that only those elements that are described by Appellants as being critical or essential to the invention must be claimed (e.g., MPEP § 2163(I)(B)). It can be seen in the specification that materials of the present invention "may" have a combination of properties (e.g., Specification page 6 lines 2-3). Thus, it is clear that the combination of properties exhibited in Table 1 are not necessarily critical or essential to the invention. 35 U.S.C. 112, first paragraph merely requires that a person skilled in the art would understand that Appellants have invented, and have been in possession of, the invention as claimed (MPEP § 2163(II)(A)(3)(a)(ii)). Each and every element of the independent claims, and the corresponding dependent claims, is supported in the originally filed specification, as discussed herein, and meets the requirements of 35 U.S.C. §112, first paragraph.

In addition, the Examiner appears to request explicit support for each possible combination of mole percents, etc. set forth in the respective ranges. In contrast to the Examiner's position, 35 U.S.C. §112, first paragraph does not require explicit enumeration of every possible combination within a given range.¹ Appellants have provided explicit enumerated support for the end-points of the claimed ranges (e.g. Example 3 and Example 8) and have further enumerated several data points in between (e.g., Examples 1-2 and 4-7). Thus, Appellants' claimed ranges meet the requirements of 35 U.S.C. §112, first paragraph.

Accordingly, this rejection of claims 1 – 9, 12 – 20, and 22 – 26 as unpatentable under 35 U.S.C. §112, first paragraph has been overcome and should be reversed.

3. Claims 1 – 9, 12 – 20, and 22 – 26 do not fail to comply with the enablement requirement of 35 U.S.C. §112, first paragraph.

In paragraph 6 of the Office Action mailed February 27, 2008, the Examiner states that claims 1 – 9, 12 – 20, and 22 – 26 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with

¹ See MPEP 2163.05(III) quoting *In re Wertheim*, 541 F.2d 257 (CCPA 1976) where a range of 25%-60% and specific examples of 36% and 50% support a range of 35%-60% and meet the description requirement of 35 U.S.C. 112, first paragraph.

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the enablement requirement. The Examiner states the claim(s) contains subject matter which was not described in the specification in such a way as to enable one skilled in the art to which it pertains, or with which it is most nearly connected, to make and/or use the invention.

The Examiner states as set forth in the MPEP 2164.04, the Examiner has the initial burden to establish a reasonable basis to question the enablement provided for the claimed invention. The Examiner states while the analysis and conclusion of a lack of enablement are based on the factors discussed in MPEP 2164.01(a) and the evidence as a whole, it is not necessary to discuss each factor in the written rejection. The Examiner also states the language should focus on those factors, reasons and evidence that lead the Examiner to conclude the specification fails to teach how to make and use the claimed invention without undue experimentation or that the scope of enablement provided to one skilled in the art is not commensurate with the scope of protection sought by the claims.

First, the Examiner states that as set forth in each of the independent claims, the invention is an absorbent composite which comprises superabsorbent material. The Examiner alleges that the superabsorbent material, as best understood, is selected for use therein based on 1) specific desired physical characteristics including its Absorption Time, equilibrium absorption capacity and Gel Bed Permeability and 2) has been specifically neutralized and the absorbent composite, i.e. the superabsorbent material alone or in combination with other material, is selected for use therein based on 1) specific desired physical characteristics². Therefore, the Examiner states the claims necessarily also define the invention by the tests or processes used to determine the selection of the superabsorbent used and the physical characteristics 1) of such, e.g. the superabsorbent prior to combination with further composite components, if any, the fibers rather than setting forth specific superabsorbent compositions or specific superabsorbent/composite combination compositions of the end product, and the tests or processes used to determine the selection of the composite used and the physical characteristics 1) of such, i.e. not the specific superabsorbent/composite combination compositions of the end product.

Second, the Examiner states that since the claimed physical characteristics 1) of the

² Appellants respectfully note that Gel Bed Permeability is not recited in the independent claims.

³ For example, similar to an M&M's® candy which is a chocolate morsel that has been coated with a candy shell (i.e., a coated morsel, or in the case of the present invention, a characteristically neutralized superabsorbent material).

⁴ Page 12 of the Office Action dated February 27, 2008 provides the following citations: the abstract, page 3, last full paragraph, page 5, first through third full paragraphs, page 6, line 19-page 7, line 5, page 7, line 19-page 8, line 19, page 9, lines 5-7 and 16-20, and page 9, line 24-page 14, last line of Dow.

⁵ MPEP 2141.02(I) states that in determining the differences between the prior art and the claims, the question under 35 U.S.C. 103 is not whether the differences themselves would have been obvious, but whether the claimed invention as a whole would have been obvious.

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superabsorbent prior to combination with the composite to form the end product must be determined and the claimed physical characteristics 1) of the composite must be determined, e.g., by a test used to measure such characteristics, the scope of the claims is enabled to the extent the test, i.e. the method and equipment or parameters thereof, measuring such characteristic is described or disclosed.

The Examiner alleges that in the instant application, for example, the claims require a superabsorbent material which has a specific equilibrium absorbent capacity and Absorption Time. The Examiner states that while on pages 29-31, a test called "FAUZL" is set forth which measures "a final equilibrium absorption capacity" and "Absorption Time" using a timer capable of reading 120 minutes, it is still not clear such capacity claimed is the same as the "final equilibrium absorption capacity" described and it is described that there are instances where measurement of 200 minutes not just 120 minutes are required but equipment and the method of measurement have still not been set forth for those instances. The Examiner states that in other words, the tests used to measure the claimed physical characteristics are not described or disclosed at all or sufficiently, i.e. not enabled, and thus, the claims relying on such are not enabled.

Third, the Examiner states the claims set forth the physical characteristics desired of the starting SAM, as best understood, rather than the specific composition of the SAM or SAM/composite in the end product. Therefore, the Examiner states relying on Ex parte Slob, 157 USPQ 172, such claims could cover any conceivable combination of materials whether presently existing or which might be discovered in the future and which would impart the desired characteristics, i.e. the claims are too broad and indefinite since they purport to cover everything having the characteristics regardless of its composition. The Examiner notes that 35 USC 101 sets forth "Whoever invents or discovers any new and useful...composition of matter...may obtain a patent therefore...title, i.e. does not include compositions that have yet to be invented and discovered. The Examiner also notes, for example, the specification at page 5, first full paragraph, e.g. "may include".

Fourth, the Examiner states that similarly, the claims do not set forth any structure of the composite but the superabsorbent, i.e. claims could cover any conceivable SAM material either presently existing or which may be discovered in the future. The Examiner states the claims do not set forth that the article is only SAM, i.e. the claims could cover any conceivable present or future absorbent material which includes at least SAM. The Examiner also states the claims do not set forth a specific process by which the SAM of the article is made into the composite, i.e. the claims could cover any conceivable present or future process of making. The Examiner states that in other words, the claims could cover any conceivable present or future absorbent composite end product which includes SAM. The Examiner notes again Ex parte Slob, supra.

Fifth, the Examiner states the lack of enabling description is now further exacerbated for the

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reasons set forth in paragraph 5 supra and paragraph 8 of the Office Action mailed February 27, 2008, i.e. the claimed neutralization of the superabsorbent invention is not supported by the original application and/or it is unclear how it is being neutralized as claimed.

The Examiner states that for these reasons and evidence, the Examiner concludes the specification fails to teach how to make and use the claimed invention without undue experimentation or that the scope of enablement provided to one skilled in the art is not commensurate with the scope of protection sought by the claims.

a. Claims 1 – 9, 12 – 20, and 22 – 26 are not unpatentable under 35 U.S.C. 112, first paragraph.

i. Equilibrium Absorption Capacity

The Examiner states that while on pages 29-31, a test called "FAUZL" is set forth which measures "a final equilibrium absorption capacity" and "Absorption Time" using a timer capable of reading 120 minutes, it is still not clear such capacity claimed is the same as the "final equilibrium absorption capacity" described. The Examiner further notes that on page 31, lines 6-8 and 15-16, each measurement is an "equilibrium absorption capacity" whereas the "final equilibrium absorption capacity" is a specifically calculated average (Office Action mailed February 27, 2008 page 7). In response, Appellants respectfully submit that the Examiner is incorrect in stating that each of the measurements on page 31 lines 6-8 is an equilibrium absorption capacity. The Specification does not support the Examiner's position, and Appellants believe the statement is merely the Examiner's contention. In fact, a closer view of the FAUZL test reveals that the time intervals listed on page 31 lines 6-8 are utilized to generate a curve on a graph as the superabsorbent sample reaches equilibrium state (see Specification page 29 line 10 – page 31 line 34, and particularly page 31 lines 27-31). Thus, one of ordinary skill in the art would recognize that each interval is not intended to be an equilibrium absorption capacity. For at least these reasons, one of ordinary skill in the art would readily recognize the actual equilibrium absorption capacity, based on the FAUZL procedure provided in the Specification.

ii. FAUZL Test Equipment

The Examiner states that the FAUZL test calls for "a timer capable of reading 120 minutes". However, the test procedure reveals that "there are instances where measurements of 200 minutes not just 120 minutes are required". In response, Appellants respectfully submit that a timer which is capable of reading 120 minutes does not preclude a timer that can also read 200 minutes. In addition, one of ordinary skill in the art, using common sense, would readily recognize that if a measurement of 200 minutes is required, a timer that is capable of reading 200 minutes could be utilized. Alternatively, one of ordinary skill in the art, using common sense, would also recognize that a timer could be

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stopped at, for example, 100 minutes and then instantly restarted for another 100 minutes to obtain a measurement of 200 minutes. Thus, Appellants respectfully submit that the FAUZL test is enabled.

iii. **Ex parte Slob**

In the Office Action dated February 27, 2008, the Examiner alleges that claims 1 – 9, 12 – 20, and 22 – 26 set forth the physical characteristics rather than the specific composition of the SAM or SAM/composite, and that the claims “could cover any conceivable combination of materials whether presently existing or which might be discovered in the future and which would impart the desired characteristic, i.e. the claims are too broad and indefinite since [they] purport to cover everything having the characteristics regardless of its composition...” In response, Appellants respectfully submit that claims 1 – 9, 12 – 20, and 22 – 26 do not fall within the scenario of Ex parte Slob. For example, in Ex parte Slob, the Board of Patent Appeals and Interferences held that the expression “a liquefiable substance having a liquefaction temperature from about 40°C to about 300°C and being compatible with the ingredients in the powdered detergent composition” was too broad and indefinite since, *inter alia*, the claim recites compounds by what it is desired that they do rather than what they are. Ex parte Slob 157 USPQ 172, 173 (Bd. Pat. App. & Int. 1967). In contrast to Ex parte Slob, Appellants' independent claims 1, 12 and 23 include numerous structural features. For example, the present invention includes an absorbent composite, which in itself is much narrower than a liquefiable substance as claimed in Ex parte Slob. In addition, the present invention also comprises superabsorbent material, another structural feature. Furthermore, the superabsorbent material must also include the features of an Absorption Time and an equilibrium absorption capacity. Still further, the superabsorbent material has been neutralized from 30 mole % to 65 mole % with a monovalent metal hydroxide, and further from 5 mole % to 40 mole % with a divalent metal hydroxide, which is yet another structural feature. Thus, the composites, disposable products and disposable absorbent garments of the present invention are clearly much narrower and more structurally defined than the invention claimed in Ex parte Slob. Dependent claims 2-9, 13-20, 22 and 24-26 add even further limitations to the invention. Thus, it can be seen that the present invention does not fall under the scenario of Ex parte Slob, but in fact meets the requirements of 35 U.S.C. §112, first paragraph.

iv. **Use of the word “may”.**

The Examiner seems to indicate that use of the word “may” somehow contributes to an alleged lack of enablement. Appellants respectfully disagree. Use of the word “may” merely means that in some aspects, a certain element(s) is included and in other aspects it is not. In either case, Appellants had possession of the invention, and use of the word “may” certainly does not negatively impact the enablement of the invention. In addition, with respect to Ex parte Slob, the claimed invention is defined by the language of the Claims, none of which include the word “may”.

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b. Conclusion.

For at least these reasons, Appellants respectfully submit that this rejection of claims 1 – 9, 12 – 20, and 22 – 26 under 35 U.S.C. 112, first paragraph has been overcome. Accordingly, this rejection should be reversed.

4. Claims 1 – 9, 12 – 20, and 22 – 26 do not fail to comply with the written description requirement.

In paragraph 7 of the Office Action mailed February 27, 2008, the Examiner rejects claims 1 – 9, 12 – 20, and 22 – 26 under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The Examiner states the claim(s) contains subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention. The Examiner also states that as set forth in MPEP 2163, the issue of a lack of adequate written description may arise even for an original claim when an aspect of the claimed invention has not described with sufficient particularity such that one skilled in the art would recognize that the Appellant had possession of the claimed invention. Further, the Examiner states the claimed invention as a whole may not be adequately described if the claims require an essential or critical feature which is not adequately described in the specification and which is not conventional in the art to or known to one of ordinary skill in the art. The Examiner states further as set forth in *Fujikawa v Wattanasin*, 93 F.3d 1559, 1571, the lack of adequate written description also arises if the knowledge and level of skill in the art would not permit one skilled in the art to immediately envisage the product claimed from the disclosed process. The Examiner states that as discussed in the preceding rejection, the tests which are essential or critical to the selection of the claimed superabsorbent and/or composite have not been disclosed or disclosed sufficiently, there is a lack of disclosure, and, at the very least, definite claiming of any specific composite or end product composition which is supported by the original application, and the claims are too broad in that the claims cover any conceivable combination of ingredients either presently existing or which may be discovered in the future and which may impart the desired characteristics. The Examiner states that therefore, the claimed invention as a whole is not adequately described because the claims require an essential or critical feature which is not adequately described in the specification and which is not conventional in the art to or known to one of ordinary skill in the art and the knowledge and level of skill in the art would not permit one skilled in the art to immediately envisage the product claimed from the disclosed process. The Examiner notes again, e.g., the first full paragraph on page 5 of the disclosure, i.e. a nonconventional approach using superabsorbent material which may include ranges of properties, i.e. properties defined by allegedly nonenabled tests, and, e.g. the Summary of the Invention section on page 3 and the paragraph bridging pages 5-6, especially the

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use of the terminology "may", i.e. the composites may have superabsorbent materials which may include certain properties which may address certain deficiencies. The Examiner states that therefore, one skilled in the art would recognize that the Appellant did not have possession of the claimed invention.

a. Claims 1 – 9, 12 – 20, and 22 - 26 are not unpatentable under 35 U.S.C. 112, first paragraph.

i. Test procedures are adequately disclosed.

In accordance with the previous rejection, the Examiner states that while on pages 29-31, a test called "FAUZL" is set forth which measures "a final equilibrium absorption capacity" and "Absorption Time" using a timer capable of reading 120 minutes, it is still not clear such capacity claimed is the same as the "final equilibrium absorption capacity" described. The Examiner further notes that on page 31, lines 6-8 and 15-16, each measurement is an "equilibrium absorption capacity" whereas the "final equilibrium absorption capacity" is a specifically calculated average (Office Action mailed February 27, 2008 page 7). However, Appellants respectfully submit that the Examiner is incorrect in stating that each of the measurements on page 31 lines 6-8 is an equilibrium absorption capacity. The Specification does not support the Examiner's statement, and Appellants believe the statement is merely the Examiner's contention. In fact, a closer view of the FAUZL test reveals that the time intervals listed on page 31 lines 6-8 are utilized to generate a curve on a graph as the superabsorbent sample reaches equilibrium state (see Specification page 29 line 10 – page 31 line 34, and particularly page 31 lines 27-31). Thus, one of ordinary skill in the art would recognize that each interval is not intended to be an equilibrium absorption capacity. For at least these reasons, one of ordinary skill in the art would readily recognize the actual equilibrium absorption capacity, based on the FAUZL procedure provided in the Specification.

In accordance with the previous rejection, the Examiner also states that the FAUZL test calls for "a timer capable of reading 120 minutes". However, the test procedure reveals that "there are instances where measurements of 200 minutes not just 120 minutes are required". In response, Appellants respectfully submit that a timer which is capable of reading 120 minutes does not preclude a timer that can also read 200 minutes. In addition, one of ordinary skill in the art, using common sense, would readily recognize that if a measurement of 200 minutes was required, a timer that is capable of reading 200 minutes could be utilized. Alternatively, one of ordinary skill in the art, using common sense, would also recognize that a timer could be stopped at, for example, 100 minutes and then instantly restarted for another 100 minutes to obtain a measurement of 200 minutes. Thus, Appellants respectfully submit that the FAUZL test is enabled.

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ii. Claims are not too broad.

The Examiner alleges that claims 1 – 9, 12 – 20, and 22 – 26 are too broad. As discussed in Section 3(a)(iii) above with respect to Ex parte Slob, the present invention includes an absorbent composite, which is much narrower than the liquefiable substance claimed in Ex parte Slob. In addition, the present invention also comprises superabsorbent material, which is another structural feature. Furthermore, the superabsorbent material must additionally include the features of an Absorption Time and an equilibrium absorption capacity. Still further, the superabsorbent has been neutralized from 30 mole % to 65 mole % with a monovalent metal hydroxide, and further from 5 mole % to 40 mole % with a divalent metal hydroxide, yet another structural feature. Thus, the claims of the present invention are clearly more narrow and structurally defined as compared to the claims of Ex parte Slob, and one of ordinary skill in the art would readily recognize that the claims are not too broad.

iii. Use of the term "may".

The Examiner alleges that by use of the word may in the specification, "one of ordinary skill in the art would recognize that the Appellant did not have possession of the claimed invention." Appellants respectfully disagree. Use of the word "may" merely means that some embodiments described in the specification have the element(s), while other embodiments do not. It is noted that not all embodiments described in the specification need be claimed. It is also noted that Appellants are not aware of any provisions in 35 U.S.C. 112, first paragraph, or in the MPEP, which prohibit use of the word "may" in the specification. 35 U.S.C. 112, first paragraph merely requires that a person skilled in the art would understand that Appellants have invented, and have been in possession of, the invention as claimed. As discussed above, each and every element of the independent claims, and the corresponding dependent claims, is supported in the originally filed specification.

b. Conclusion.

Accordingly, this rejection of claims 1 – 9, 12 – 20, and 22 – 26 as unpatentable under 35 U.S.C. 112, first paragraph has been overcome and should be reversed.

5. Claims 1 – 9, 12 – 20, and 22 – 26 are not indefinite and do not fail to particularly point out and distinctly claim the subject matter which Appellants regard as the invention.

In paragraph 8 of the Office Action February 27, 2008, the Examiner rejected claims 1 – 9, 12 – 20, and 22 – 26 under U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which Appellant regards as the invention.

The Examiner states that in claims 1, 12 and 23 it is allegedly unclear how the superabsorbent has been neutralized, i.e. how the superabsorbent can be neutralized from 30 to 65 mole % with a monovalent hydroxide and yet also be neutralized further from 5 to 40 mole % with a divalent

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hydroxide. The Examiner also states that for the reasons also set forth supra, the claims are indefinite, vague and too broad, and instructs Appellants to see Ex parte Slob, supra.

a. Claims 1 – 9, 12 – 20, and 22 - 26 are not unpatentable under 35 U.S.C. 112, second paragraph.

i. Superabsorbent material neutralization.

The Examiner alleges that it is unclear how the superabsorbent has been neutralized. Appellants respectfully disagree that it is unclear. For example, claims 1 – 9, 12 – 20, and 22 - 26 include the feature of "the superabsorbent material has been neutralized from 30 mole % to 65 mole % with a monovalent metal hydroxide, and further from 5 mole % to 40 mole % with a divalent metal hydroxide." One of ordinary skill in the art would readily recognize that this means the superabsorbent material is neutralized up to a first point, and then it is further neutralized from that first point to a second point. In addition to the clear language of the claims, Examples 1-8 of the present invention provide further support for the meaning of this limitation in the claims. For instance, Example 1 states that "A solution of 28 wt% acrylic acid in water is neutralized with sodium hydroxide to a degree of 60 mole % and with calcium hydroxide a further 10 mole % under constant cooling to maintain a temperature less than 40°C." (Specification page 11 lines 19-21 (*emphasis added*)). For at least these reasons, claims 1 – 9, 12 – 20, and 22 – 26, and particularly the neutralization limitation of the claims, meets the requirements of 35 U.S.C. 112, second paragraph.

ii. Ex parte Slob

The Examiner repeats the statement that the claims are indefinite, vague and too broad as per Ex parte Slob. Appellants have discussed above that the claims are not indefinite, vague and too broad as per Ex parte Slob, and that the present invention does not fall under the scenario of Ex parte Slob, but in fact meet the requirements of 35 U.S.C. § 112. More particularly, Appellants respectfully submit that the Board of Patent Appeals and Interferences held that the expression "a liquefiable substance having a liquefaction temperature from about 40°C to about 300°C and being compatible with the ingredients in the powdered detergent composition" was too broad and indefinite since, *inter alia*, the claim recites compounds by what it is desired that they do rather than what they are. Ex parte Slob 157 USPQ 172, 173 (Bd. Pat. App. & Int. 1967). In contrast to Ex parte Slob, Appellants' independent claims 1, 12 and 23 include numerous structural features. For example, the present invention includes an absorbent composite, which in itself is much narrower than a liquefiable substance as claimed in Ex parte Slob. In addition, the present invention also comprises superabsorbent material, another structural feature. Furthermore, the superabsorbent material must also include the features of an Absorption Time and an equilibrium absorption capacity. Still further, the superabsorbent material has been neutralized from 30 mole % to 65 mole % with a monovalent metal hydroxide, and further from 5

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mole % to 40 mole % with a divalent metal hydroxide, which is yet another structural feature. Thus, the composites, disposable products and disposable absorbent garments of the present invention are clearly much narrower and more structurally defined than the invention claimed in Ex parte Slob. Dependent claims 2-9, 13-20, 22 and 24-26 add even further limitations to the invention. Thus, it can be seen that the present invention does not fall under the scenario of Ex parte Slob, but in fact meets the requirements of 35 U.S.C. §112, second paragraph.

b. Conclusion.

Accordingly, this rejection of this claims 1 – 9, 12 – 20, and 22 - 26 as unpatentable under 35 U.S.C. 112, second paragraph has been overcome and should be reversed.

6. Claims 1 – 9, 12 – 20, 22 – 26 are not anticipated by, or alternatively are not obvious over, World Publication No. WO 01/41818 issued to The Dow Chemical Company (hereinafter "Dow").

In paragraph 11 of the Office Action mailed February 27, 2008, the Examiner rejects claims 1 – 9, 12 – 20, and 22 - 26 under 35 U.S.C. 102(b) as anticipated by or, in the alternative, under 35 U.S.C. 103(a) as obvious over International Patent Publication No. WO 01/41818 issued to The Dow Chemical Company (hereinafter "Dow").

With respect to claims 1-4 and 24, the Examiner directs Appellants to see, e.g., the Claim Language Interpretation section of the Office Action mailed February 27, 2008 and Dow at the abstract, page 3, last full paragraph, page 5, first through third full paragraphs, page 6, line 19-page 7, line 5, page 7, line 19-page 8, line 19, page 9, lines 5-7 and 16-20, and page 9, line 24-page 14, last line of Dow, i.e. an absorbent composite comprising superabsorbent material as disclosed, e.g. superabsorbent material comprising partially neutralized acrylic acid and which has been neutralized to the percentage claimed, as best understood, the Examiner directs Appellants to see the Claim Language Interpretation section supra and page 6, lines 19 et seq, i.e. at least 30 mole %, by alkali metal hydroxides, including specific mention of sodium hydroxide (alkali metals include calcium also), an internal crosslinking agent, a surface cross-linking agent, a capacity greater than 25/g/g and an Absorption Rate Index which is time which equals about 10+10 a2 as claimed. The Examiner notes that, especially due to the lack of enablement, it is allegedly unclear whether this time is the same as the claimed "Absorption Time" nor not. The Examiner states that thus the Dow reference clearly teaches all the claimed structure and properties except for the characteristics of "Absorption Time" and the Gel Bed Permeability of the superabsorbent material as claimed. However, the Examiner states, as noted supra, Dow allegedly teaches similar materials for similar purposes and same or substantially similar properties, i.e. a capacity and a slow absorption time. The Examiner again notes such characteristics are those of the superabsorbent making up the claimed composite, and such material, as now best understood by the Examiner, is tested prior to formation of such composite by the

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disclosed tests or processes, i.e. the specific characteristics of such material of the end product composite are allegedly unknown, and those of the composite, i.e. the specific characteristics of the end product composite are also allegedly unknown. Therefore, the Examiner's first position is that for the reasons set forth supra, i.e. same or similar compositions, purposes, desired properties to accomplish such purposes, etc., there is reasonable factual basis to conclude that the structure of Dow also inherently possesses superabsorbent material and an absorbent composite with the claimed test characteristics or values when tested according to Appellants' tests, as best understood. The Examiner further states that, in any case, the Examiner's second position, at the very least, the general conditions of the claim are disclosed by Dow and it is not inventive, i.e. it would be obvious to one of ordinary skill in the art, to discover the optimum or workable ranges, i.e. Appellants' ranges, by routine experimentation, *In re Aller*, 105 USPQ 333 (CCPA 1955).

With respect to claims 5-10 and 12-23 and 25-26, the Examiner directs Appellants to see the discussion of claims 1-4 and supra as well as page 9, line 28-page 11, line 13, and thus U.S. Patent No. 5,149,335 issued to Kellenberger (hereinafter Kellenberger '335"), U.S. Patent No. 5,147,343 issued to Kellenberger (hereinafter "Kellenberger '343"), U.S. Patent No. 4,798,603 issued to Meyer (hereinafter "Meyer"), U.S. Patent No. 5,520,673 issued to Yarbrough (hereinafter "Yarbrough"), and U.S. Patent No. 5,728,082 issued to Gustafsson (hereinafter "Gustafsson") incorporated thereby which teach the SAM material distributed homogenously within a composite, e.g. Kellenberger '343, zoned within a composite, e.g. Kellenberger '335, Meyer, Yarbrough, Gustafsson, within a layer of a plurality of layers of a composite, e.g. Gustafsson, Yarbrough or Meyer, alone or zoned in such layer, e.g. Yarbrough, zoned along a perimeter, e.g. Yarbrough, or laminated onto a substrate, e.g. Yarbrough.

a. Claim Interpretation.

In paragraph 9 of the Office Action mailed February 27, 2008, the Examiner notes that lines 6-8 of claim 1 and similar language in claims 12 and 23 allegedly describe the processing of the superabsorbent material, i.e. a product by process. The Examiner states, however, due to the alleged lack of clarity set forth in paragraph 8 of the Office Action, a composite, product or garment as claimed in claims 1, 12 and 23, respectively, which includes a superabsorbent which is neutralized at least 30 mole percent by at least one of a monovalent or divalent metal hydroxide at some time prior to the completion of the manufacture of the end product will be considered to meet the claim limitation.

i. Not Product-by-Process.

Appellants respectfully disagree that the phrase "has been neutralized from 30 mole % to 65 mole % with a monovalent metal hydroxide, and further from 5 mole % to 40 mole % with a divalent metal hydroxide" as featured in independent claims 1, 12 and 23 makes each claim a product-by-

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process claim. In contrast to the contention set forth by the Examiner, the phrase merely describes the structure of the superabsorbent material.³ Appellants therefore respectfully submit that the claims should not be viewed as product-by-process claims.

ii. Claim language interpretation.

With respect to Appellants' claim feature "*the superabsorbent material has been neutralized from 30 mole % to 65 mole % with a monovalent metal hydroxide, and from 5 mole % to 40 mole % with a divalent metal hydroxide*", the Examiner has stated that "a superabsorbent which is neutralized at least 30 mole percent by at least one of a monovalent or divalent metal hydroxide at some time prior to the completion of the manufacture of the end product will be considered to meet the claim limitation" (Office Action mailed February 27, 2008, page 11 (*emphasis added*)). Appellants respectfully disagree with the Examiner's interpretation of the claim language. Use of the word "and" in Appellants' claim language means that both a monovalent metal hydroxide and a divalent metal hydroxide are required. It does not mean at least one of a monovalent or a divalent metal hydroxide. It appears that the Examiner is improperly interpreting the word "and" to be the word "or", thus attempting to transform the two elements into alternative elements, rather than required elements. The claim clearly states "and further", and one of ordinary skill in the art would not interpret the word "and" to be equivalent to the word "or". Appellants therefore respectfully request that the claim language be interpreted as requiring both elements, rather than as alternative elements.

b. Claims 1 – 9, 12 – 20, and 22 – 26 are not anticipated by Dow under 35 U.S.C. 102(b).

In accordance with MPEP § 2131, a claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference. The present invention, as set forth in the amended claims, is directed to absorbent composites (as well as products and garments that include the absorbent composites) which comprise superabsorbent material. The superabsorbent material has an Absorption Time of about $5+10 a^2$ minutes or greater, wherein a is the mean particle size of the superabsorbent material in millimeters, and an equilibrium absorption capacity of about 15 g/g or greater as measured by the FAUZL test. In addition, the superabsorbent material has been neutralized from 30 mole % to 65 mole % with a monovalent metal hydroxide, and further from 5 mole % to 40 mole % with a divalent metal hydroxide.

In comparison, Dow does not teach an absorbent composite per se, but rather teaches a process for producing a superabsorbent material. In addition, Dow also does not disclose a superabsorbent material that has been neutralized from 30 mole % to 65 mole % with a monovalent metal hydroxide, and further from 5 mole % to 40 mole % with a divalent metal hydroxide. Furthermore, Dow does not disclose a superabsorbent material having an Absorption Time of about $5+10 a^2$ minutes or greater, and an equilibrium absorption capacity of about 15 g/g or greater.

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Therefore, Dow does not disclose each and every element, either expressly or inherently, of the present, as required by MPEP § 2131. For at least these reasons, Appellants submit that this rejection of claims 1 – 9, 12 – 20, and 22 – 26 has been overcome. Appellants respectfully request that this rejection under 35 U.S.C. §102(b) be **reversed**.

c. Claims 1 – 9, 12 – 20, and 22 – 26 are not obvious over Dow under 35 U.S.C. 103(a).

i. All elements are not present.

Appellants respectfully submit that the requirements of MPEP §2142 and §2143 are not present as Dow at least does not teach or suggest all of the claim limitations of claims 1 – 9, 12 – 20, and 22 – 26 of the present invention, there is no suggestion or motivation to modify Dow, and there would not be a reasonable expectation of success to utilize Dow to arrive at Appellants' recited invention.

In particular, as presented in independent claims 1, 12 and 23, and thus also their dependent claims 2 – 9, 13 – 20, 22 and 24 – 26, each claim contains at least one element not found in the cited reference, which is an absorbent composite comprising a superabsorbent material that has been neutralized from 30 mole % to 65 mole % with a monovalent metal hydroxide, and further from 5 mole % to 40 mole % with a divalent metal hydroxide.

In contrast to Appellants' invention, Dow is not directed to an absorbent composite having the features of Appellants' invention. Rather, Dow is directed to a method for the preparation of superabsorbent polymers (Dow, page 3 lines 16-17). Pertinent disclosure by Dow to a neutralized polymer occurs at page 6 line 19 – page 7 line 5. Dow discloses that compounds useful to neutralize acid groups include alkali metal hydroxides, and alkali metal carbonates and bicarbonates (Dow, page 6 lines 26-29). Dow further teaches that preferably, sodium or potassium hydroxides or carbonates are employed, each of which is monovalent (Dow page 6 lines 29-30). Dow does not teach the use of both a monovalent metal hydroxide and a divalent metal hydroxide, and Dow certainly does not teach a superabsorbent material that has been neutralized from 30 mole % to 65 mole % with a monovalent metal hydroxide, and further from 5 mole % to 40 mole % with a divalent metal hydroxide.

It is respectfully submitted by Appellants that, as discussed above, the claims of the present invention are not product-by-process claims. However, even if the claims were deemed product-by-process, the resulting product of Dow would not be the same as Appellants' invention. One of ordinary skill in the art would readily recognize that the superabsorbent material present in the composite of Appellants' invention would include both monovalent metal ions and divalent metal ions based on the fact that the polymer had been neutralized with both. In addition, the monovalent and divalent metal ions would be present in particular quantities based on the degree of neutralization desired for each

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metal ion. The presence of both the monovalent and divalent metal ions help allow Appellants to achieve properties of the absorbent composite that are desired. In contrast, as taught by Dow, a resulting superabsorbent polymer according to the method of Dow would only have monovalent ions present from the neutralization, thus resulting in a chemically different structure (and thus a different product) than that of Appellants.

In addition, one of ordinary skill in the art would not be motivated to utilize or modify Dow to result in Appellants' invention. For example, Dow provides no teaching that would lead one of ordinary skill in the art to develop an absorbent composite that comprises a superabsorbent material that has been neutralized from 30 mole % to 65 mole % with a monovalent metal hydroxide, and further from 5 mole % to 40 mole % with a divalent metal hydroxide, and thus to arrive at a superabsorbent material having the structure and characteristics of the present invention.

Therefore, it can be seen that Dow does not teach or suggest all of the claim limitations of independent claims 1, 12 and 23, as well as their respective dependent claims, as set forth by MPEP § 2143.

ii. Dow teaches away.

The Examiner has provided numerous citations within Dow in an attempt to demonstrate a disclosure or teaching of the present invention.⁴ However, these citations fail to provide a disclosure or suggestion of the present invention. For example, Dow does not teach or suggest a superabsorbent material that has been neutralized from 30 mole % to 65 mole % with a monovalent metal hydroxide, and further from 5 mole % to 40 mole % with a divalent metal hydroxide. In contrast, as Appellants best understand it, the Dow citations provided by the Examiner are directed to items such as coordination compounds, polymers, covalent crosslinking agents, surface crosslinking agents and dispersing agents. While Dow page 6 line 26 – page 7 line 5 states that the acid groups of the monomer can be neutralized with compounds that will "sufficiently neutralize the acid groups without having a detrimental effect on the polymerization process", Dow then provides the specific preferable compounds of sodium or potassium hydroxides or carbonates as suitable neutralization compounds, both of which are monovalent, not a monovalent and a divalent, as recited in the present invention (Id.). Thus, it appears that Dow teaches away from a superabsorbent material that has been neutralized from 30 mole % to 65 mole % with a monovalent metal hydroxide, and further from 5 mole % to 40 mole % with a divalent metal hydroxide; or at least does not teach or disclose such a feature.

iii. No reasonable expectation of success.

As demonstrated above, Dow does not teach or suggest all of the claim limitations of independent claims 1 – 9, 12 – 20, and 22 – 26, and it does not provide motivation to do so. For example, Dow does

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not teach or suggest a superabsorbent material that has been neutralized from 30 mole % to 65 mole % with a monovalent metal hydroxide, and further from 5 mole % to 40 mole % with a divalent metal hydroxide, and an Absorption Time of $5+10a^2$, and an equilibrium absorption capacity of 15 g/g.⁵ Thus, one of ordinary skill in the art using Dow on its own, without knowledge of Appellants' teachings, would not have a reasonable expectation of success to arrive at Appellants' invention.

iv. Impermissible hindsight.

The Court in KSR held that a factfinder should be aware of the distortion caused by hindsight bias and must be cautious of arguments reliant upon *ex post* reasoning (KSR v. Teleflex, 127 S.Ct. 1727, 1742 (U.S. 2007)). It seems clear that the Examiner is utilizing the teachings of Appellants in an attempt to modify Dow to allegedly arrive at Appellants' invention. Appellants respectfully note that MPEP §§ 2142 and 2143 require that the teaching or suggestion to make the claimed combination and the reasonable expectation of success must both be found in the prior art, and not based on Appellants' disclosure. *In re Vaack*, 947 F.2d 4899 (Fed. Cir. 1991). The mere fact that the prior art may be modified in the manner suggested by the Examiner does not make the modification obvious unless the prior art suggested the desirability of the modification. *In re Gordon*, 733 F.2d at 902, 221 USPQ at 1127. *In re Fritch*, 23 USPQ 2nd 1780, 1783-1784 (Fed. Cir. 1992). It is impermissible to use the claimed invention as an instruction manual or "template" to piece together the teachings of the prior art so that the claimed invention is rendered obvious. *In re Gorman*, 933 Fed. 2nd 982, 987, 18 USPQ 2d 1885, 1888 (Fed. Cir. 1991). *In re Fritch*, 23 USPQ 2nd 1780 at 1784 (Fed. Cir. 1992). The Court in KSR held that a patent composed of several elements is not proved obvious merely by demonstrating that each of the elements was, independently, known in the prior art (KSR, 127 S.Ct. at 1741). The court further emphasized the importance of identifying a reason that would have prompted a person of ordinary skill in the relevant field to combine the elements in the way the claimed new invention does, which the Examiner has not provided (*Id.*).

As previously discussed above, any suggestion by the Examiner to modify Dow based on the knowledge gained from Appellants is improper. For example, a superabsorbent material that has been neutralized from 30 mole % to 65 mole % with a monovalent metal hydroxide, and further from 5 mole % to 40 mole % with a divalent metal hydroxide was simply not available at the time of filing, based on Dow, as cited by the Examiner.

For at least these reasons, one of ordinary skill in the art would not be motivated to modify Dow to arrive at Appellants' invention.

v. Conclusion.

Appellants' invention would not have been contemplated without the use of the teachings of Appellants. In addition, Dow not only lacks teaching of the Appellants' recited features, but further, 1)

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one of ordinary skill in the art would not be motivated to modify Dow to arrive at Appellants' invention; 2) Dow potentially teaches away from the present invention; 3) Dow, as cited on its own, would not successfully result in the present invention; and 4) the Examiner attempts to use impermissible hindsight to arrive at Appellants' invention.

Accordingly, this rejection of claims 1 – 9, 12 – 20, and 22 – 26 as unpatentable under 35 U.S.C. 103(a) has been overcome and should be **reversed**.

7. Final Notes – Items not on appeal.

a. Objection to Summary.

In paragraph 4 of the Office Action mailed February 27, 2008, the Examiner objects to the disclosure because of the following alleged informalities: The Summary of the Invention section on page 3, i.e. a description of the claimed invention, and the invention of the claims are still not commensurate in scope.

This objection is not currently on appeal. Appellants agree to consider measures to obviate the objection, should it become necessary.

b. Double Patenting.

In paragraph 13 of the Office Action mailed February 27, 2008, the Examiner provisionally rejects claims 1 – 9, 12 – 20, and 22 – 26 on the ground of nonstatutory obviousness-type double patenting as being unpatentable over the claims of U.S. Patent No. 7,285,614 in view of Dow.

This "provisional" rejection is not currently on appeal. Since it is not the only remaining rejection for the present application, it would be premature to address this provisional rejection any further at this time. Appellants agree to consider measures to obviate the provisionally obvious-type double patenting rejection in view of U.S. Patent No. 7,285,614 in view of Dow, should it become necessary.

Conclusion

For the reasons set forth in the above arguments, it is respectfully submitted that the rejections should be **reversed**. It is respectfully submitted that claims 1 – 9, 12 – 20, and 22 – 26 meet the requirements of 35 U.S.C. §112, first paragraph and 35 U.S.C. §112, second paragraph. It is also respectfully submitted that Dow does not anticipate claims 1 – 9, 12 – 20, and 22 – 26. It is further respectfully submitted that the Office Action dated February 27, 2008 has not established a prima facie case of obviousness since each and every element is not present, there would not be a reasonable expectation of success to appropriately modify the cited reference, Dow appears to teach away from

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the present invention, and it appears that the Examiner is utilizing inappropriate hindsight in an attempt to modify Dow to arrive at Appellants' invention. It is therefore readily apparent that when the cited reference is considered in its entirety and is taken as a whole, Dow would not teach Appellants' claimed invention.

Accordingly, it is respectfully submitted that claims 1 – 9, 12 – 20, and 22 – 26 are in allowable condition, and that the rejections in the Office Action dated February 27, 2008 should be reversed.

Please charge the \$500.00 fee (fee code 1402), pursuant to 37 C.F.R. 41.20(b)(2), for filing this Appeal Brief to Kimberly-Clark Worldwide, Inc. deposit account number 11-0875. It is believed that no further prosecutorial fee are required; however, any additional prosecutorial fees which are due may also be charged to deposit account number 11-0875. If a fee is required for an extension of time under 37 C.F.R. 1.136 not accounted for above, such extension is requested and should also be charged to our Deposit Account 11-0875.

The undersigned may be reached at: (920) 721-4405.

Respectfully submitted,

RICHARD N. DODGE II ET AL.


By: 

Bryan R. Rosiejka

Registration No.: 55,583

CERTIFICATE OF TRANSMISSION

I, Bryan R. Rosiejka, hereby certify that on July 28, 2008 this document is being facsimile transmitted to the United States Patent and Trademark Office, Fax No. (571) 273-8300.


Bryan R. Rosiejka

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Claims Appendix

The claims on appeal are:

1. An absorbent composite comprising superabsorbent material;
wherein the superabsorbent material has an Absorption Time of about $5+10 a^2$ minutes or greater,
wherein a is the mean particle size of the superabsorbent material in millimeters, and an
equilibrium absorption capacity of about 15 g/g or greater as measured by the FAUZL test; and
wherein the superabsorbent material has been neutralized from 30 mole % to 65 mole % with a
monovalent metal hydroxide, and further from 5 mole % to 40 mole % with a divalent metal
hydroxide.
2. The absorbent composite of Claim 1, wherein the superabsorbent material has an equilibrium
absorbent capacity of about 25 g/g or greater as measured by the FAUZL test.
3. The absorbent composite of Claim 1, wherein the superabsorbent material has an Absorption Time
of about $10+10 a^2$ minutes or greater.
4. The absorbent composite of Claim 1, wherein the superabsorbent material has a Gel Bed
Permeability of about $20 \times 10^{-9} \text{ cm}^2$ or greater.
5. The absorbent composite of Claim 1, wherein the superabsorbent material is substantially
homogeneously distributed within the absorbent composite.
6. The absorbent composite of Claim 1, wherein the superabsorbent material is zoned within a target
area of the absorbent composite.
7. The absorbent composite of Claim 1, wherein the absorbent composite comprises a plurality of
layers and the superabsorbent material is located in a layer of the absorbent composite.
8. The absorbent composite of Claim 7, wherein the superabsorbent material is zoned within a target
area of the layer of the absorbent composite.
9. The absorbent composite of Claim 1, wherein the superabsorbent material is incorporated primarily
away from a target area of the absorbent composite.
10. - 11. (Canceled)

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12. A disposable product comprising an absorbent composite;
wherein the absorbent composite comprises a superabsorbent material having an Absorption Time of about $5+10 a^2$ minutes or greater, wherein a is the mean particle size of the superabsorbent material in millimeters, and an equilibrium absorption capacity of about 15 g/g or greater as measured by the FAUZL test; and
wherein the superabsorbent material has been neutralized from about 30 mole % to about 65 mole % with a monovalent metal hydroxide, and further from about 5 mole % to about 40 mole % with a divalent metal hydroxide.
13. The disposable product of Claim 12, wherein the superabsorbent material has an equilibrium absorption capacity of about 25 g/g or greater.
14. The disposable product of Claim 12, wherein the superabsorbent material has an Absorption Time of about $10+10 a^2$ minutes or greater.
15. The disposable product of Claim 12, wherein the superabsorbent material has a Gel Bed Permeability of about $20 \times 10^{-9} \text{ cm}^2$ or greater.
16. The disposable product of Claim 12, wherein the superabsorbent material is substantially homogeneously distributed within the absorbent composite.
17. The disposable product of Claim 12, wherein the superabsorbent material is zoned within a target area of the absorbent composite.
18. The disposable product of Claim 12, wherein the absorbent composite comprises a plurality of layers and the superabsorbent material is located in a layer of the absorbent composite.
19. The disposable product of Claim 18, wherein the superabsorbent material is zoned within a target area of the layer of the absorbent composite.
20. The disposable product of Claim 12, wherein the superabsorbent material is incorporated primarily away from a target area of the absorbent composite.
21. (Canceled)

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22. The disposable product of Claim 12, wherein the disposable product is selected from a diaper, an adult incontinence product, a bed pad, a sanitary napkin, a tampon, a tissue, a wipe, a tissue, a bib, a wound dressing, or food packaging.

23. An absorbent disposable garment comprising:

a body-side liner;

an outer cover superposed in facing relation with the body-side liner; and,

an absorbent composite located between the body-side liner and the outer cover,

wherein the absorbent composite comprises superabsorbent material having an Absorption Time of about $5+10a^2$ minutes or greater, wherein a is the mean particle size of the superabsorbent material in millimeters, and an equilibrium absorption capacity of about 15 g/g or greater as measured by the FAUZL test; and

wherein the superabsorbent material has been neutralized from about 30 mole % to about 65 mole % with a monovalent metal hydroxide, and further from about 5 mole % to about 40 mole % with a divalent metal hydroxide.

24. The absorbent composite of claim 1 wherein the monovalent metal hydroxide is sodium hydroxide and the divalent metal hydroxide is selected from the group consisting of calcium hydroxide and magnesium hydroxide.

25. The disposable product of claim 12 wherein the monovalent metal hydroxide is sodium hydroxide and the divalent metal hydroxide is selected from the group consisting of calcium hydroxide and magnesium hydroxide.

26. The absorbent disposable garment of claim 23 wherein the monovalent metal hydroxide is sodium hydroxide and the divalent metal hydroxide is selected from the group consisting of calcium hydroxide and magnesium hydroxide.

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Evidence Appendix

None.

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Related Proceedings Appendix

None.